IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs April 25, 2006

STATE OF TENNESSEE v. MARLIN C. GOFF

Direct Appeal from the Criminal Court for Sullivan County
No. S46492 Allen W. Wallace, Sr. Judge

No. E2005-02090-CCA-R3-CD - Filed September 14, 2006

Following a jury trial, Defendant, Marlin C. Goff, was found guilty of rape of a child, a Class A felony, and was sentenced to twenty-five years' confinement. In his appeal, Defendant contends that (1) the evidence is insufficient to support his conviction; (2) the trial court failed to properly ascertain the competency of the victim to testify; (3) the trial court erred in allowing the State to cross-examine Defendant concerning his failure to give a statement to the investigating officers; and (4) the length of his sentence is excessive. There is no indication in the record that Defendant filed a motion for new trial, *see* Tenn. R. App. P. 3(e), and thus issue (2) is waived. As to issue (3), we have reviewed the issue under the discretion extended by Rule 52(b) of the Tennessee Rules of Criminal Procedure and find no plain error. Accordingly, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court Affirmed

THOMAS T. WOODALL, J., delivered the opinion of the court, in which JERRY L. SMITH and JAMES CURWOOD WITT, JR., JJ. joined.

A. D. Jones, Jr., Bristol, Tennessee, for the appellant, Marlin C. Goff.

Paul G. Summers, Attorney General and Reporter; Leslie Price, Assistant Attorney General; H. Greeley Wells, Jr., District Attorney General; Barry Staubus, Assistant District Attorney General; and Rebecca H. Davenport, Assistant District Attorney General, for the appellee, the State of Tennessee.

OPINION

I. Background

Charletta Tester testified that the victim in this case, A.B., was born on June 15, 1996, and was five years old at the time of the offense. (The minor victim will be referred to by her initials). Ms. Tester is A.B.'s grandmother. Ms. Tester's daughter, Tanya Goff, was married to Defendant, and the couple had an infant daughter, Brittany. Ms. Goff's daughter, A.B., was Defendant's step-daughter.

Ms. Tester stated that in March 2002, Ms. Goff and Ms. Goff's two daughters, A.B. and Brittany, lived with Ms. Tester. Defendant, who was unemployed, lived with his sister, Lisa Lynn Bowers. Ms. Goff did not have a driver's license so Defendant drove Ms. Goff in his brown and white van when Ms. Goff needed transportation.

On Friday, March 1, 2002, Ms. Tester left for work at approximately 7:00 a.m., and A.B. caught the school bus to her kindergarten class around 7:35 a.m. No one was home when Ms. Tester arrived home from work that evening. Defendant, Ms. Goff, A.B., and Brittany arrived at Ms. Tester's house around 8:00 p.m. Ms. Goff left A.B. in Ms. Tester's care, and Ms. Goff and Brittany left again with Defendant. Ms. Tester said that A.B. was quieter than usual that night. A.B. made frequent trips to the bathroom and complained of pain. Ms. Tester said that she noticed at one point that A.B.'s pants were wet.

Ms. Goff did not come home Friday night. On Saturday, Ms. Tester said that A.B. was withdrawn and was still using the bathroom frequently. Ms. Tester noticed a white discharge in A.B.'s urine, and A.B. urinated on herself which was very unusual. Ms. Tester examined A.B. and noticed that her vaginal area was red, swollen, and irritated. Ms. Tester asked A.B. what was wrong, but A.B. responded, "I can't." Ms. Goff did not come home Saturday night.

Ms. Tester pressed A.B. to tell her what was wrong when A.B. still acted withdrawn and in pain on Sunday. A.B. told Ms. Tester what had happened, and Ms. Tester took A.B. to the emergency room at approximately 6:30 p.m. Ms. Tester said that the examining doctor administered a rape kit and prescribed some medicine. Ms. Tester said that although A.B. called Defendant "Daddy" before the incident, afterwards she referred to Defendant as "Chris."

On cross-examination, Ms. Teaster acknowledged that she did not have a good relationship with Defendant, and that she disapproved of his and Ms. Goff's living arrangement. Ms. Tester denied, however, that she expressed her disapproval of Defendant in front of her grandchildren. She denied that she was upset with Ms. Goff for leaving A.B. with her on March 1, 2002.

Tanya Goff testified that Defendant lived at his sister's house, and she lived with her mother. Ms. Goff said that she and Defendant spent time together on weekends. On Friday, March 1, 2002, Defendant picked up Ms. Goff and Brittany after A.B. had left for school. Ms. Goff said that they visited with Ms. Bowers during the morning. In the afternoon, she, Defendant, and Brittany picked A.B. up from school in Defendant's van and returned to Ms. Bowers' trailer. On the way, Defendant told Ms. Goff that he wanted to have sex with A.B. Ms. Goff said she did not say anything in response. Defendant parked the van in front of Ms. Bowers' trailer, and he and Ms. Goff engaged in sexual intercourse while the children were in the van. Ms. Goff said that she got dressed and took the children into the trailer while Defendant stayed outside to work on his van.

Ms. Bowers' children, Nicki and Joey Bowers, arrived home from school, and A.B. went outside to play with them. The Bowers' children came inside at some point without A.B. Ms. Goff said she went to find A.B. and opened the van's sliding side door. Ms. Goff said that Defendant was

on top of A.B. with his penis in A.B.'s vagina. Ms. Goff said that she dressed A.B., and she and A.B. returned to the trailer. A.B. went to the bathroom and urinated on herself. Defendant drove Ms. Goff, A.B. and Brittany to Ms. Tester's house because Ms. Goff did not have a change of clothes for A.B. Ms. Goff said that A.B. did not want to leave her grandmother's house, so she and Defendant left without her.

Ms. Goff said that Defendant took her back to Ms. Tester's house on Sunday evening, and her brother, Christopher Cox, told her that A.B. and Ms. Tester were at the hospital. Ms. Goff said she was "shocked," not because A.B. had told her grandmother what had happened, but because Ms. Goff was afraid she was going to get into trouble.

Ms. Goff said that Detective Stanley Hodges with the Sullivan County Sheriff's Department contacted her on Monday, March 4, 2002. Ms. Goff gave a written statement concerning the incident. Ms. Goff subsequently entered a plea of guilty to the offense of rape of a child and was sentenced to twenty years' imprisonment.

On cross-examination, Ms. Goff said that Ms. Tester expressed her negative feelings about Defendant in front of A.B. Ms. Goff said that she knew what was going to happen that afternoon between Defendant and A.B. when A.B. did not come back into the trailer with Ms. Bowers' children. Ms. Goff said that she grabbed Defendant's arm and pulled him off of A.B. Ms. Goff said that Defendant's pants were down, and he had recently ejaculated. Ms. Goff said that she did not clean A.B. before taking A.B. to her grandmother's house. Ms. Goff acknowledged that she did not say anything to Defendant about the incident. Ms. Goff said that Ms. Tester was angry with her when she brought A.B. to Ms. Tester's house on Friday night because Ms. Tester had planned to go out for the evening. Ms. Goff said that she left A.B. with Ms. Tester without changing her clothes. Ms. Goff said that she spent Friday and Saturday night with Defendant at Ms. Bowers' trailer.

Ms. Goff said that she did not remember going to the post office to pick up Defendant's parents' social security checks on March 1, 2002, and she denied that the family went to McDonald's Restaurant to eat supper that night.

A.B. testified that just before her mother was imprisoned when she was five years old, she lived with Ms. Goff, Brittany, and her grandparents, the Testers. A.B. said that on the afternoon of the offense, Defendant, Ms. Goff, and Brittany picked her up from kindergarten, and the family went to Ms. Bowers' trailer. During her direct examination, A.B. was shown drawings of generic male and female figures, and she identified the areas which she called "private parts." A.B. said that her nickname for a penis was "peanut." A.B. said that when a man and a woman have sex, "[t]he man puts his peanut in a girl's private parts."

A.B. said that Defendant and her mother had sexual intercourse in the van after the family arrived at Ms. Bowers' trailer. A.B. said that her mother left the van, and then Defendant took A.B.'s clothes off and "had sex" with her. A.B. said she told Defendant to "stop it." A.B. said Defendant put his "peanut" in her "private part," and it hurt.

A.B. acknowledged that she had "potty problems" the weekend following the incident, and that her grandmother noticed her wet pants. A.B. said that Ms. Tester took her to the hospital after A.B. told her about the incident.

On cross-examination, defense counsel asked A.B. who she had talked to about the case, and A.B. pointed to the two prosecutors assigned to the case. A.B. said that she also talked to her grandmother about the trial. A.B. said that she remembered Detective Hodges asking her if Defendant had sexual intercourse with her, and A.B. told him "no." On redirect examination, A.B. said that the prosecutors and Ms. Tester told her to tell the truth.

Dr. Steven Combs testified that he examined A.B. on March 3, 2002, when she was brought into the emergency room by her maternal grandparents. Dr. Combs first asked A.B. to tell him what happened. Ms. Tester told A.B. it was all right to talk to Dr. Combs. A.B. said that Defendant and Ms. Goff "had sex" in the van. A.B. explained to Dr. Combs that "having sex" meant that "the man gets on top of the woman and goes up and down." A.B. said that Defendant took off her clothes and "poked his thing in her front and in her back." A.B. told Defendant to stop because he was hurting her, and Defendant put his hand over her mouth. A.B. said that Defendant bit her left thumb and one of her fingers on her right hand. A.B. told Dr. Combs that Defendant and Ms. Goff told A.B. not to tell anyone about the incident or "they would have to spank her or kill her." A.B. told Dr. Combs "that she had to pee all the time."

Dr. Combs said that Ms. Tester spoke twice during the interview. Before he began questioning A.B., Ms. Tester told A.B. that it was all right to talk to Dr. Combs because he was a doctor. Dr. Combs said that A.B. grew quiet about halfway through the interview, and Ms. Tester said, "That's okay; you can tell him."

Dr. Combs said that a physical examination revealed bruising on A.B.'s left thumb and right finger consistent with bites. A.B.'s entire vaginal area was red, swollen and irritated. The area around the urethral orifice was swollen closed and was the reason why A.B. experienced pain when urinating. Dr. Combs said that the hymen was not transected but explained that penetration can be achieved without transecting the hymen. Dr. Combs said that his examination was impeded by the swelling in the vaginal area, and he referred A.B. to the Children's Advocacy Center for a further examination with a colposcope. Dr. Combs said that A.B. had been cleaned off, and he would not expect to find semen two days after the incident. Based on his examination, Dr. Combs' diagnosis was that A.B. had been "sexually assaulted or raped."

Dr. Katherine Lynn Scruggs testified that she examined A.B. on March 8 or March 9, 2001, at the Children's Advocacy Center of Sullivan County. A.B. had been placed in foster care, and her foster mother, rather than Ms. Tester, was present during the examination. During the medical history portion of the examination, A.B. told Dr. Scruggs that Defendant and Ms. Goff had sexual intercourse first, and then Defendant had sexual intercourse with her. Dr. Scruggs asked A.B. what Defendant did to her, and A.B. pointed to her front and back genital area and "made a thrusting back

and forth motion." A.B. also told Dr. Scruggs that Defendant bit her. A.B. said that after the incident, she had pain when she urinated and she urinated frequently.

Dr. Scruggs said that the swelling in A.B.'s vaginal area had subsided. Dr. Scruggs used a colposcope, which is similar to a lighted magnifying lens, during the examination. Dr. Scruggs detected a small notch, or healed tear, at the bottom of the vaginal opening. Dr. Scruggs said that such notches are either congenital, or caused by trauma such as penile penetration or a "straddle" injury. Dr. Scruggs said that the force necessary to cause a notch through injury would have to be significant and precise, such as falling on a sharp object. Dr. Scruggs said that her examination results were consistent with A.B.'s medical history of penile penetration.

Captain Johnny Murray, with the Sullivan County Sheriff's Department, testified that he and other investigating officers drove to Meadowlark Lane Apartments to speak with Defendant on March 4, 2002. Defendant was not there, but he soon arrived in his van. Captain Murray said that the officers identified themselves and told Defendant they needed to speak to him at the Sheriff's department. Captain Murray stated that Defendant agreed to accompany the officers and got into the patrol car. On the drive to the station, Defendant said, "I didn't do anything to her." Captain Murray told Defendant that he did not know anything about the case, and that the detective would talk to him later.

The State rested its case-in-chief, and the defense put on the following proof. Lisa Lynn Bowers testified that Defendant spent Thursday night, February 28, 2002, at her trailer. When he got up on Friday, Defendant told Ms. Bowers that he was going to pick up Ms. Goff and Brittany from the Testers' home, and his mother, Wenoka Bowers, from the nursing home. All four returned to Ms. Bowers' trailer that morning. Ms. Bowers said that her mother went with Defendant, Ms. Goff, and Brittany to pick up A.B. after school. Ms. Bowers said that everybody got out of Defendant's van when the family got back. Ms. Bowers said that neither Ms. Goff nor A.B. went outside that afternoon, although she thought that Defendant left the trailer "maybe once or twice."

Ms. Bowers said that the entire family decided to eat supper at McDonald's Restaurant in Bristol. Ms. Bowers did not notice anything wrong with A.B. when they returned from the restaurant, but she said that A.B. urinated in her pants at some point after their return. Defendant drove Ms. Goff, Brittany, and A.B. back to Ms. Tester's home that evening, and Defendant returned to Ms. Bowers' trailer alone. Ms. Bowers said that Defendant told her he was going to spend the night with a friend, Forrest Myers. On Monday, March 4, 2002, Ms. Bowers said that Defendant took her to Bristol to purchase some car parts. When they returned to Ms. Bowers' trailer, detectives from the Sullivan County Sheriff's Department arrested Defendant.

On cross-examination, Ms. Bowers said that she sometimes provided financial assistance and shelter to Defendant's family when they needed it. Ms. Bowers said that Defendant did not appear upset over the weekend. Ms. Bowers acknowledged writing a letter to Ms. Goff after Ms. Goff was incarcerated, warning Ms. Goff, "I would be deathly afraid of what might happen to me. . . . I know that, because I told a big lie on a friend of mine before. I know how it feels." Ms. Bowers said that

when the detectives approached Defendant on Monday, March 4, 2002, one of the detectives asked Defendant "if he knowed [sic] what they were there for." Ms. Bowers said that Defendant replied, "Yeah. I'm pretty sure I know what you're here for." Ms. Bowers acknowledged that she was surprised and shocked at Defendant's arrest.

Forrest Myers testified that Defendant came over to his house on Friday afternoon, March 1, 2002, and spent the night. Mr. Myers said that the two men talked and watched television, and Mr. Myers fixed dinner. Mr. Myers said that Defendant left some time on Saturday morning. On cross-examination, Mr. Myers said he did not know what time Defendant arrived on Friday.

Defendant testified that he and Ms. Goff lived apart because Defendant had lost his job and could not afford to pay for the family's housing. Defendant acknowledged that he and Ms. Tester did not "get along," but he could not articulate a basis for the discord. Defendant said that he left Ms. Bowers' trailer on Friday, March 1, 2002, at about 9:30 a.m. He picked up Ms. Goff and Brittany from Ms. Tester's house, and then drove to the Greystone Health Care Center in Blountville to visit with his mother and his stepfather, who was a resident of the facility. The family, including Defendant's mother, left the nursing home, stopped at the bank and the post office, and then drove to Ms. Bowers' trailer between 12:00 p.m. and 1:00 p.m.

Defendant, Ms. Goff, and Brittany picked A.B. up from school around 3:30 p.m. and returned to Ms. Bowers' trailer. Defendant said that everyone got out of the van and went inside the trailer. Defendant denied engaging in sexual intercourse with Ms. Goff inside the van. Defendant said that A.B. and Ms. Bowers' children played video games that afternoon, and A.B. never left the trailer. Defendant denied engaging in sexual intercourse with A.B.

Defendant said that later that afternoon, he drove the family to Bristol to eat supper at McDonald's Restaurant. Defendant did not notice anything wrong with A.B. Defendant said that A.B. urinated in her pants after supper because she drank a lot of soda at McDonald's. Defendant said that he, Ms. Goff, Brittany, A.B., and Wenoka Bowers drove to the Tester's house and left A.B. there. The remaining family members went to the nursing home and visited Defendant's step-father for approximately twenty-five to thirty minutes. Defendant's mother remained at the nursing home, and Defendant drove Ms. Goff and Brittany back to the Testers' house. Defendant said that he drove alone to Mr. Myers' home where he spent Friday night.

Defendant said that he tried to reach Ms. Goff by telephone on Monday, March 4, 2002. Ms. Tester answered the telephone and told Defendant that Ms. Goff was at the police station because A.B. had accused Defendant of molesting her. Defendant told Ms. Tester "that was bull crap." Defendant said that to his knowledge the investigating officers did not examine his clothes or van, or perform any type of DNA testing. He also did not believe that the officers examined Ms. Goff's or A.B.'s clothing for DNA evidence. Defendant said that the investigating officers did not give him a voice stress test, or polygraph test, when they interviewed him.

On cross-examination, Defendant acknowledged that Ms. Tester did not like him because he was not providing for his family. Defendant said that Ms. Bowers did not notice that A.B. had urinated in her pants because A.B. did not go back into the trailer when the group returned from McDonald's. Defendant said that he did not recall telling Ms. Bowers about the accusations on Monday morning when they drove to Bristol.

II. Sufficiency of the Evidence

Defendant challenges the sufficiency of the convicting evidence, contending that (1) the medical proof was inconsistent with Ms. Goff's and A.B.'s testimony; (2) A.B. admitted that she had been told what to say on the witness stand by Ms. Tester and the prosecutors; (3) the State failed to produce any DNA evidence connecting Defendant to the commission of the offense; and (4) Ms. Bowers' testimony confirmed Defendant's version of the events of March 1, 2002.

When a defendant challenges the sufficiency of the convicting evidence, we must review the evidence in a light most favorable to the prosecution in determining whether a rational trier of fact could have found all the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S.307, 319, 99 S. Ct. 2781, 2789, 61 L. Ed. 2d 560 (1979). Once a jury finds a defendant guilty, his or her presumption of innocence is removed and replaced with a presumption of guilt. *State v. Black*, 815 S.W.2d 166, 175 (Tenn. 1991). The defendant has the burden of overcoming this presumption, and the State is entitled to the strongest legitimate view of the evidence along with all reasonable inferences which may be drawn from that evidence. *Id.; State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982). The jury is presumed to have resolved all conflicts and drawn any reasonable inferences in favor of the State. *State v. Sheffield*, 676 S.W.2d 542, 547 (Tenn. 1984). Questions concerning the credibility of witnesses, the weight and value to be given the evidence, and all factual issues raised by the evidence are resolved by the trier of fact and not this court. *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997). These rules are applicable to findings of guilt predicated upon direct evidence, circumstantial evidence, or a combination of both direct and circumstantial evidence. *State v. Matthews*, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990).

Defendant was convicted of the offense of rape of a child which is defined as "the unlawful sexual penetration of a victim by the defendant, or the defendant by a victim, if such victim is less that thirteen (13) years of age." T.C.A. § 39-13-522(a). "Sexual penetration" includes sexual intercourse or "any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of the victim's, the defendant's, or any other person's body, but emission of semen is not required." *Id.* § 39-13-501(7).

A.B. testified that she was five years old when the incident occurred. Both A.B. and Ms. Goff testified that Defendant penetrated A.B.'s vagina with his penis while he and A.B. were inside Defendant's van. Dr. Combs and Dr. Scruggs testified that the results of A.B.'s physical examination after the incident were consistent with penile penetration. Defendant contends that if he had penetrated A.B. with his penis as Ms. Goff and A.B. alleged, a medical examination would have revealed a ruptured hymen, not merely redness and swelling of the genital area.

Dr. Combs referred A.B. to the Children's Advocacy Center for further examination because the swelling around A.B.'s vaginal area precluded a more thorough examination. Dr. Scruggs examined A.B. a few days later after the swelling had subsided and observed a notch, or healed tear, in A.B.'s hymen with the aid of a colposcope. Although such a tear could be congenital or caused by injury, Dr. Scruggs testified that the most probable cause of the notch was penile penetration. Defense counsel thoroughly cross-examined Dr. Scruggs on her findings, eliciting Dr. Scruggs' testimony that a five-year-old girl's hymen more likely than not would have torn if the victim's vagina was fully penetrated by an adult male. Dr. Scruggs, however, also responded that the notch on A.B.'s hymen "could represent a tear," and there was nothing in A.B.'s medical history to suggest that the notch was caused by something other than penile penetration.

Our Supreme Court has recognized that

> [t]here is . . . "sexual penetration" in a legal sense if there is the slightest penetration of the sexual organ of the female by the sexual organ of the male. It is not necessary that the vagina be entered or that the hymen be ruptured; the entering of the vulva or labia is sufficient.

Hart v. State, 21 S.W.3d 901, 905 (Tenn. 2000) (citing *Walker v. State*, 197 Tenn. 452, 273 S.W.2d 707, 711 (Tenn. 1954)).

Defendant's challenges to the testimony of the medical experts, Ms. Goff, and A.B., and the lack of DNA evidence, goes to the weight of the proffered testimony and the credibility of the witnesses, which are assessments left for resolution by the trier of fact. The jury heard Defendant's and Ms. Bower's testimony concerning the incident, and, by its verdict, obviously resolved any conflicts in favor of the State's witnesses. *See State v. Grace,* 493 S.W.2d 474, 476 (Tenn.1973) ("A guilty verdict by the jury, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the State.")

Our supreme court stated the rationale for this rule:

> This well-settled rule rests on a sound foundation. The trial judge and the jury see the witnesses face to face, hear their testimony and observe their demeanor on the stand. Thus the trial judge and jury are the primary instrumentality of justice to determine the weight and credibility to be given to the testimony of witnesses. In the trial forum alone is there human atmosphere and the totality of the evidence cannot be reproduced with a written record in this Court.

Bolin v. State, 219 Tenn. 4, 11, 405 S.W.2d 768, 771 (1966) (citing *Carroll v. State,* 212 Tenn. 464, 370 S.W.2d 523 (1963)).

Based on a thorough review of the record, we conclude that the evidence is sufficient for a rational trier of fact to find beyond a reasonable doubt that Defendant is guilty of the offense of rape of a child. Defendant is not entitled to relief on this issue.

III. Competency of the Victim to Testify

Defendant argues that the trial court failed to properly examine A.B. as to her understanding of the nature and meaning of an oath, and as to whether A.B. was capable of testifying as to the facts surrounding the offense. Defendant contends that A.B.'s nodding of her head rather than giving verbal responses to the trial court's questions provided an insufficient basis for the trial court's determination that A.B. was a competent witness.

There is no indication in the record that Defendant filed a motion for new trial, and the State argues that Defendant has thus waived consideration of this issue on appeal. "[I]n all cases tried by a jury, no issue presented for review shall be predicated upon error in the admission or exclusion of evidence, jury instructions granted or refused, . . . or other ground upon which a new trial is sought, unless the same was specifically stated in a motion for a new trial; otherwise such issues will be treated as waived." Tenn. R. App. P. 3(e); *see State v. Martin*, 940 S.W.2d 567, 569 (Tenn.1997) (holding that a defendant relinquishes the right to argue on appeal any issues that should have been presented in a motion for new trial); *State v. Dodson*, 780 S.W.2d 778, 780 (Tenn. Crim. App.1989). In addition, appellate relief is generally not available when a party has "failed to take whatever action was reasonably available to prevent or nullify the harmful effect of any error." Tenn. R. App. P. 36(a).

Nonetheless, were we to review Defendant's error on the merits, we would find no abuse of discretion by the trial court in finding A.B. competent to testify. Rule 601 of the Tennessee Rules of Evidence provides that "[e]very person is presumed competent to be a witness except as otherwise provided in these rules or by statute." "Virtually all witnesses may be permitted to testify: children, mentally incompetent persons, convicted felons." Tenn. R. Evid. 601, Advisory Commission Comments. Rule 603 of the Tennessee Rules of Evidence provides that "[b]efore testifying, every witness shall be required to declare that the witness will testify truthfully by oath or affirmation, administered in a form calculated to awaken the witness's conscience and impress the witness's mind with the duty to do so." The common law rule is that if a child witness "understands the nature and meaning of an oath, has the intelligence to understand the subject matter of the testimony, and is capable of relating the facts accurately," the child is deemed competent to testify. *State v. Ballard*, 855 S.W.2d 557, 560 (Tenn. 1993); *see also State v. Howard*, 926 S.W.2d 579, 584 (Tenn. Crim. App. 1996), *overruled on other grounds by State v. Williams*, 977 S.W.2d 101 (Tenn. 1998).

In a hearing outside the presence of the jury, the trial court questioned A.B. concerning her understanding of the distinction between the truth and a lie. The trial court observed that A.B., who was eight years old at the time of trial, was very nervous. At first, A.B. did not respond to any of the trial court's questions other than those inquiries dealing with her personal background. A.B. said that she was in the third grade and lived with her "Mamaw" in Dandridge. A.B. said that her sister,

Brittany, was three years old. A.B. nodded affirmatively when asked if she was going to tell the truth and if she had told the truth when questioned by other people about the incident. A.B. acknowledged by nodding her head affirmatively that she was taught in Sunday School "about the things that [she was] not supposed to do," including lying. A.B. responded, "Yes," when asked if she knew what it meant to lie, and indicated that she was not going to lie in court. Defense counsel objected to A.B.'s non-verbal responses, and the trial court stated, "She's right nervous, but I think she's qualified to testify. I'm going to rule she's qualified to testify."

"The determination of the competency of a minor witness is properly a matter within the discretion of the trial court, who has the opportunity to observe the witness 'up close and personal.'" *Howard*, 926 S.W.2d at 584 (citing *State v. Caughron*, 855 S.W.2d 526, 538 (Tenn. 1993); *State v. Braggs*, 604 S.W.2d 883, 885-86 (Tenn. Crim. App. 1980)). The trial court's decision to allow a witness to testify will not be overturned absent an abuse of that authority. *Id.*

There is no indication in the record that A.B.'s non-verbal responses to the trial court's questions were in any way ambiguous. The trial court had the opportunity to observe A.B.'s demeanor and non-verbal responses. A. B. indicated that she understood the distinction between the truth and a lie, and she affirmatively indicated that she would tell the truth in court. Based on our review of the record, we conclude that the trial court did not abuse its discretion by allowing A.B. to testify. Defendant is not entitled to relief on this issue.

IV. Testimony Regarding Defendant's Post-Arrest Silence

Defendant argues that the trial court erred in permitting the State to question Defendant on cross-examination about his refusal to give a statement when interviewed by Detective Hodges. Defendant contends that the challenged questions embodied impermissible comments on the exercise of his constitutional right to remain silent after arrest.

The State argues that this issue is waived by Defendant's failure to file a motion for new trial. Whether properly assigned or not, however, this Court may consider plain error upon the record under Rule 52(b) of the Tennessee Rules of Criminal Procedure. *State v. Ogle*, 666 S.W.2d 58, 60 (Tenn. 1984). Plain error is not merely error that is conspicuous, but is an especially egregious error that strikes at the fairness, integrity, or public reputation of the judicial proceedings. *See State v. Wooden*, 658 S.W.2d 553, 559 (Tenn. Crim. App. 1983). In *State v. Adkisson*, 899 S.W.2d 626, 639 (Tenn. Crim. App. 1994), this Court established five factors to be applied in determining whether an error is plain:

(a) the record must clearly establish what occurred in the trial court;

(b) a clear and unequivocal rule of law must have been breached;

(c) a substantial right of the accused must have been adversely affected;

(d) the accused [must not have waived] the issue for tactical reasons; and

(e) consideration of the error must be "necessary to do substantial justice."

Id. (citing Tenn. R. Crim. P. 52(b)). The record must support the presence of all five factors; the absence of only one factor precludes further consideration. *State v. Smith*, 24 S.W.3d 274, 283 (Tenn. 2000).

It is well settled that a defendant generally may not be penalized at trial for the exercise of his constitutional right to remain silent after arrest. *Doyle v. Ohio*, 426 U.S. 610, 618, 96 S. Ct. 2240, 2245, 49 L. Ed. 2d 91 (1976). Thus, it is generally improper for a prosecutor to comment on a defendant's post-arrest silence or use it to impeach a defendant's testimony during trial. *Braden v. State*, 534 S.W.2d 657, 660 (Tenn. 1976); *State v. Mabe*, 655 S.W.2d 203, 205 (Tenn. Crim. App. 1983).

This prohibition, however, is not unqualified. The *Doyle* court noted, for example, that

> [i]t goes almost without saying that the fact of post-arrest silence could be used by the prosecution to contradict a defendant who testifies to an exculpatory version of events [at trial] and claims to have told the police the same version upon arrest. In that situation the fact of earlier silence would not be used to impeach the exculpatory story, but rather to challenge the defendant's testimony as to his behavior following arrest.

Doyle, 426 U.S. at 619 f.n.11, 96 S. Ct. at 2245.

In *State v. Braden*, our Supreme Court observed that a balance must be struck between a defendant's constitutional right to remain silent and "allowing full testing of the truth of defendant's trial testimony." *Braden*, 534 S.W.2d at 660. When a defendant testifies in his own behalf, he or she is subjected "to the impeaching effect of proof of any prior inconsistent statements they might have made, which would otherwise be inadmissible as being obtained in violation of [the defendant's] *Miranda* rights, and to the impeaching effect of any prior inconsistent actions on [his or her] part." *Id.* The court noted, however, that it "hasten[ed] to emphasize that evidence of pre-trial silence of the defendant must be admitted with caution and then only where such silence is patently inconsistent with the defendant's testimony." *Id.*

The State contends that its line of questioning was proper because Defendant's trial testimony that he cooperated with the investigating officers was "patently inconsistent" with his post-arrest silence. Specifically, Defendant asserted at trial that he was not administered a voice stress test, which, while itself a true statement, left an unarticulated impression that the police officers' investigation was less than thorough. The State submits that the reason why Defendant's interview did not reach the point where a voice stress test might be administered was not Detective Hodge's lack of interest in questioning Defendant, but Defendant's exercise of his right to remain silent.

On direct examination, defense counsel posed a series of questions to Defendant concerning the scope of the police officers' investigation. Defendant acknowledged that the officers did not collect his, Ms. Goff's or A.B.'s clothes which they were wearing on the day of the offense, did not conduct any DNA testing, and did not examine the inside of his van for physical evidence. Defense counsel then inquired:

[DEFENSE COUNSEL]: Do you know if . . . did they ever give you any type of stress, voice stress test or anything of that nature?

[DEFENDANT]: No, sir. No, sir.

The State later cross-examined Defendant as follows:

[THE STATE]: And then [defense counsel] asked you, "Well, they didn't give you a stress test?" Right? You were asked that question?

[DEFENDANT]: That's correct.

[THE STATE]: Well, isn't it true that [Detective] Hodges came to talk to you, and you didn't want to talk to him, did you?

[DEFENDANT]: I didn't say that I didn't want to talk to him. He acted like he didn't want to talk to me because whenever he told me to answer questions and whenever I went to answer questions, he acted like he didn't want to talk to me.

[THE STATE]: Well, let me ask you. Didn't he go to you and advise you of your [*Miranda*] Rights?

[DEFENDANT]: Yes, he did.

[THE STATE]: And you didn't give him a statement? He wanted . . . he came to you . . . he actually went out and got you, brought you in for the purpose of talking to you and you wouldn't talk to him. Isn't that correct?

[DEFENDANT]: I didn't . . . to my knowledge, I didn't . . . I did not say that I didn't want to talk to him.

[THE STATE]: Well, let me ask you, why would they . . .?

At this point, defense counsel objected to the State's line of questioning as an impermissible comment on Defendant's exercise of his right to remain silent after arrest. Following a hearing outside of the presence of the jury, the trial court found,

> [T]he impression that [Defendant] and his lawyer both now have left this jury is how cooperative he was, and he says now that they didn't even want to ask him any questions. As long as he's going to stick to that story, then they have got the right to introduce the Waiver of Rights Form and then they've got a right to ask him whether or not he made a statement or not, and if he says he didn't, then I'm going to give a cautionary instruction to the Jury at that time, not wait until the end but at that time, that that's a right he has, but the way, the impression that has been left so far by direct examination, by his testimony here, is that he was ready to cooperate and it was the officer's fault. As long as you want to take that position, you're going to leave that door wide open, so the State will be very limited on the questions you ask initially and then we'll proceed from there, but I think they have so much now, that you have a right to introduce that Waiver of Rights Form and simply ask him whether he chose to talk to the officers or not.

The State resumed its cross-examination:

> [THE STATE]: [Detective] Hodges asked you for a statement, and you did not give him one. Is that correct?
>
> [DEFENDANT]: That's correct.
>
> . . .
>
> [THE COURT]: Members of the Jury, the fact that the Defendant chose not to give a statement, that's a constitutional right he has. You can place no significance on that fact.

The prosecutor again referenced Defendant's refusal to give the investigating officers a statement during closing argument:

> Finally, let's talk about the Defendant and his testimony and his credibility. He tells you he heard this, but yet he never told anybody about it. Never showed any outrage. He knew all about it. He said that he wanted to be cooperative under direct examination, but what is the evidence? Do you see an exhibit where [Detective] Hodges talked to him? He didn't want to be cooperative. Ladies and Gentlemen, he has a right not to talk. There is no question about that. The Judge will give you an instruction. That is not the point. The point is that he said he was cooperative. You weigh the credibility by looking at that piece of paper with his initials on it[.]

We believe the facts and circumstances presented in this case are analogous to the exception envisioned by the *Doyle* court to the prohibition against the State's inquiries into a defendant's post-arrest, post-*Miranda* silence. Defendant presented lengthy "negative evidence" testimony, concluding with the fact that the investigating officers did not administer him a voice stress test. A voice stress test, however, could not be administered if Defendant invoked his constitutional right to remain silent. The jury was entitled to know that Defendant refused to make any statements in order to appreciate the contradictory nature of his testimony. Thus, the use of Defendant's post-arrest silence was offered not to impeach his exculpatory testimony at trial, but to challenge Defendant's testimony concerning the conduct of the investigating officers after his arrest. *See Doyle*, 426 U.S. at 619 f.n.11, 96 S. Ct. at 2245.

Based on the foregoing, we conclude that Defendant has failed to show that a substantial right was adversely affected which precludes the finding of "plain error." *Adkisson*, 899 S.W.2d at 639. Defendant is not entitled to relief on this issue.

V. Sentencing Issues

Defendant challenges the length of his sentence, arguing that the trial court erred in not considering as a mitigating factor that he was diagnosed with a learning disability and classified as a "slow learner" in school. Defendant also contends that the trial court failed to take into consideration the fact that not all of the tests usually performed during a Sex Offender Risk Assessment were completed prior to the sentencing hearing.

When a defendant challenges the length or the manner of service of his or her sentence, this Court must conduct a *de novo* review with a presumption that the determinations made by the trial court are correct. T.C.A. § 40-35-401(d); *State v. Imfeld*, 70 S.W.3d 698, 704 (Tenn. 2002). This presumption, however, is contingent upon an affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances. *State v. Pettus*, 986 S.W.2d 540, 543-44 (Tenn. 1999). If the record fails to show such consideration, the review of the sentence is purely *de novo*. *State v. Shelton*, 854 S.W.2d 116, 123 (Tenn. Crim. App. 1992). Because the trial court erred in the application of certain enhancement factors, our review is *de novo* without a presumption of correctness.

In making its sentencing determinations the trial court must consider: (1) the evidence presented at the sentencing hearing; (2) the pre-sentence report; (3) the principles of sentencing and arguments as to sentencing alternatives; (4) the nature and characteristics of the criminal conduct; (5) any appropriate enhancement and mitigating factors; (6) the defendant's potential or lack of potential for rehabilitation or treatment; and (7) any statements made by Defendant in his own behalf. T.C.A. §§ 40-35-103 and -210; *State v. Williams*, 920 S.W.2d 247, 258 (Tenn. Crim. App. 1995). The defendant bears the burden of showing that his sentence is improper. T.C.A. § 40-35-401(d) Sentencing Commission Comments; *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991).

As a Range I, standard offender, Defendant is subject to a sentence of between fifteen and twenty-five years for his conviction of rape of a child, a Class A felony. T.C.A. §§ 40-35-112(a)(1). In calculating the sentence for a Class A felony conviction, the presumptive sentence is the midpoint of the range if there are no enhancement or mitigating factors. *Id.* § 40-35-210(c). If there are enhancement but no mitigating factors, the trial court may set the sentence at or above the midpoint of the range. *Id.* § 40-35-201(d). Should there be enhancement and mitigating factors, the trial court must start at the midpoint of the range, enhance the sentence within the range as appropriate for the enhancement factors, then reduce the sentence within the range as appropriate for the mitigating factors. *Id.* § 40-35-201(e).

We note that effective June 7, 2005, the General Assembly amended Tennessee Code Annotated sections 40-35-102, -210, and -401. *See* 2005 Tenn. Pub. Acts ch. 353, §§ 1, 6, 8. However, the amended code sections are inapplicable to the defendant's appeal. For defendants who are sentenced after June 7, 2005, for offenses committed on or after July 1, 1982, and prior to June 7, 2005, the defendant may elect to be sentenced under the provisions of the act by executing a waiver of such defendant's ex post facto protections. There is no indication in the record that Defendant executed such a waiver. Thus, Defendant's offense, which was committed prior to June 7, 2005, will be governed by prior law. *See* T.C.A. § 40-35-114 (2005), Sentencing Commission Comments.

At the sentencing hearing, the State relied on the presentence report and the Sex Offender Risk Assessment which indicated that Defendant was at a moderate to high-risk to reoffend. Defendant was twenty-eight years old at the time of the sentencing hearing. He attended Sullivan East High School in Bluff City but dropped out in the ninth grade. According to his school records, Defendant was psychologically tested in 1988 and fell within the average range of intelligence. It was determined, however, that he met the criteria for the "learning disabled." Defendant was retested in 1991 wherein it was determined that he did not have learning disabilities, but should be considered a "slow learner." Defendant stated in the presentence report that he had numerous disciplinary actions taken against him in high school for various infractions including underage drinking, stealing and fighting, and was suspended approximately twenty times.

Defendant stated in the presentence report that he and Tanya Goff were married on November 11, 2001. The couple lived first with Defendant's sister, Lisa Bowers, and then rented an apartment in Bristol. In January 2002, he lost his full-time job and "was forced" to return to his sister's home while Ms. Goff, A.B., and the couple's daughter, Brittany, went to live at Ms. Goff's mother's house.

Defendant stated in the presentence report that he worked part-time repairing engines for Richard's Small Engine Repair in Bluff City from 1996 until his arrest in 2002. Kim Holden, the owner of the business, was interviewed during the preparation of the presentence report and stated that Defendant had never been an employee of the company. Ms. Holden acknowledged, however, that Defendant would perform various types of cleaning services, such as sweeping, "when he needed food or gas money." Ms. Holden stated that Defendant did not repair engines for the company.

According to the presentence report, Defendant has prior convictions of assault and battery, two public intoxication offenses, and two traffic offenses. Defendant was given a suspended sentence of eleven months, twenty-nine days for his assault conviction. His probation was revoked on April 30, 2002, and the trial court ordered Defendant to serve his original sentence in confinement.

Tanya Goff's statement was included in the presentence report. According to Ms. Goff, she and Defendant began living together sometime before July 1998. Ms. Goff discovered Defendant having sexual intercourse with her daughter, A.B., when A.B. was three years old. Ms. Goff stated, "[Defendant] told me that he was having sexual intercourse with my daughter, [A.B.], on a regular basis while we lived in Washington County. He said I could not please him sexually." In the summer of 2000, the family lived in a tent in Ms. Bowers' yard, and lived in various other temporary housing facilities, until Ms. Goff and her daughters moved in with Ms. Tester.

Concerning the current offense, Ms. Goff said in her statement that Defendant wanted "to have sexual intercourse with [A.B.], and I said 'OK.' That was when we drove to [Ms. Bowers'] house. I know [sic] when I get [sic] out of the van that [Defendant] was going to have sexual intercourse with my five-year-old daughter."

Ms. Tester submitted a victim's impact statement on behalf of A.B. Ms. Tester said that A.B. and her sister, Brittany, were placed in foster care for nine months after Ms. Goff's arrest. Ms. Tester gained custody of the two children, and the family moved out of the area so that A.B. could have "a fresh start." Ms. Tester said that A.B. is doing "very well" now, although she missed her mother and wanted to see her. Ms. Tester stated that A.B. does not understand "why [Defendant] would want to hurt her."

The State submitted seven proposed enhancement factors for the trial court's consideration: enhancement factor (3), Defendant was a leader in the commission of an offense involving two or more criminal actors; enhancement factor (5), the victim was particularly vulnerable because of age or physical or mental disability; enhancement factor (6), Defendant treated the victim with exceptional cruelty during the commission of the offense; enhancement factor (7), the personal injuries inflicted upon the victim were particularly great; enhancement factor (8), the offense involved a victim and was committed to gratify the defendant's desire for pleasure or excitement; enhancement factor (16), Defendant abused a position of private trust; and enhancement factor (17), the crime was committed under circumstances under which the potential for bodily injury to a victim was great. *See* T.C.A. § 40-35-114(3), (5), (6), (7), (8), (16), and (17) (2003).

Without stating its findings on the record, other than as to Defendant's violation of a private trust as the victim's stepfather, the trial court found that all seven enhancement factors were appropriate considerations in determining the length of Defendant's sentence. The trial court stated:

> What he did to this little girl, starting at three years old. He got caught in this case by as horrible a set of circumstances as I know, so this serious offense is about as

> serious an offense as you can have. With all the enhancement factors that are present, here he is a father figure to her, a father figure to her. That is all she had as a father, and what did he do? . . . He raped her.

We note initially Defendant's argument that the trial court erred in not taking into consideration the fact that a Sex Offender Risk Assessment pursuant to Tennessee Code Annotated section 39-13-705(a) was not completed prior to the sentencing hearing. We glean from the record that the preparer of Defendant's Sex Offender Risk Assessment apparently had difficulty scheduling an interview with Defendant and thus could not complete the evaluation. Regardless, Defendant was convicted of a Class A felony and thus is not presumed to be a favorable candidate for alternative sentencing. The plain language of the statute demonstrates the legislature's intent to limit the evaluation requirement imposed upon sex offenders "to those sentencing decisions at the trial level where the sex offender is seeking probation or some other form of an alternative sentence." *See* T.C.A. § 39-17-705; *State v. Evangeline Combs and Joseph D. Combs*, Nos. E2000-02801-CCA-R3-CD, E2000-02800-CCA-R3-CD, 2002 WL 31118329, at *77 (Tenn. Crim. App., at Knoxville, Sept. 25, 2002), *perm. to appeal denied* (Tenn. Jan. 27, 2003) (observing that "[w]here a sex offender is destined to be incarcerated regardless of the contents of the report, a trial court's failure to consider it at the time of sentencing is immaterial and a waste of resources") (citing *State v. Daniel Lovell Brown*, No. 03C01-9709-CC-00410, 1999 WL 798922, at *5 (Tenn. Crim. App., at Knoxville, Nov. 12, 1998), *perm. to appeal denied* (Tenn. Apr. 19, 1999) (observing that "[b]ecause a sex offender sentenced to the Department of Correction will be evaluated once in its custody, any evaluation at the trial level of an offender ineligible for probation or any other alternative sentence would constitute a duplication of professional and financial resources")). Thus, the trial court did not err in refusing to consider Defendant's sex offender evaluation report, complete or otherwise.

Defendant argues that the trial court erred in not considering Defendant's learning abilities in mitigation of the length of his sentence. While a trial court may consider various facts and circumstances under the "catch all" provision of Tennessee Code Annotated section 40-35-113(13), it is not required to consider such factors. *See State v. Williams*, 920 S.W.2d 247, 261 (Tenn. Crim. App.1995). Defendant offers no argument as to how his classification as a "slow learner" correlates to a diminished culpability for his offense. Defendant has failed to convince us that the trial court erred in declining to mitigate his sentence because of this factor.

Based on our review, we conclude that the trial court properly considered enhancement factor (16). Defendant clearly abused his private trust as A.B.'s stepfather in the course of committing these offenses. *See* T.C.A. § 40-35-114(16) (2003); *State v. Kissinger*, 922 S.W.2d 482, 488 (Tenn. 1996). Based on Ms. Goff's testimony at trial that she knew about the offense and, at a minimum, tacitly allowed the offense to occur, the trial court properly considered Defendant's role as a leader in the commission of the offense. *See* T.C.A. § 40-35-114(3) (2003). We conclude that the trial court also properly considered enhancement factor (8), that the offense was committed to gratify the defendant's desire for pleasure or sexual excitement. Ms. Goff testified at trial that Defendant told her that he wanted to have sexual intercourse with A.B. as the family drove to Ms. Bowers' trailer to spend the afternoon. Ms. Goff said that she first had sexual intercourse with Defendant in front

of A.B., and then let A.B. stay outside, knowing what Defendant intended to do. Most notable is that Ms. Goff said in her statement in the presentence report that Defendant said he was having sexual intercourse with A.B. because Ms. Goff could not please Defendant sexually.

The more difficult questions involve the applicability of enhancement factors (5), (6), (16), and (17) based on the record before us. Nonetheless, even if it was error for the trial court to consider these enhancement factors, the record clearly supports application of enhancement factors (3), (8), and (16) in determining the length of Defendant's sentence. Based on our *de novo* review, we conclude that the presence of three enhancement factors, and no mitigating factors, is sufficient to support the trial court's sentence of twenty-five years. *See State v. Gomez*, 163 S.W.3d 632, 659 (Tenn. 2005) (upon the finding of even one enhancement factor, "the statute affords to the judge discretion to choose an appropriate sentence anywhere within the statutory range"). Defendant is not entitled to relief on this issue.

CONCLUSION

After a thorough review of the record, we affirm the judgment of the trial court.

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THOMAS T. WOODALL, JUDGE